No. 06-400

In the Supreme Court of the United States

ELLIS C. SMITH, PETITIONER

v.

JIM NICHOLSON,
SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals, upon determining that a Department of Veterans Affairs regulation was ambiguous, correctly deferred to the Department's long-standing interpretation of the regulation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 451 F.3d 1344. The opinion of the Court of Appeals for Veterans Claims (Pet. App. 16a-52a) is reported at 19 Vet. App. 63.

JURISDICTION

The judgment of the court of appeals (Pet. App. 53a) was entered on June 19, 2006. The petition for a writ of certiorari was filed on September 18, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The United States compensates veterans during peacetime "for disabilit[ies] resulting from personal injury suffered or disease contracted in line of duty." 38

U.S.C. 1131. To that end, Congress has conferred upon the Secretary of Veterans Affairs (Secretary) the authority to "adopt and apply a schedule of ratings of reductions in earning capacity from specific injuries or combination of injuries." 38 U.S.C. 1155. The schedule of ratings essentially dictates whether and to what extent a particular service-connected injury is compensable.

Before 1999, the schedule of ratings, Section 4.87 of Title 38, Code of Federal Regulations, Diagnostic Code (DC) 6260, identified "Tinnitus: Persistent as a symptom of head injury, concussion or acoustic trauma" as a compensable injury. On June 10, 1999, the Secretary amended DC 6260 to identify "Tinnitus: recurrent" as a compensable injury. See 64 Fed. Reg. 25,202 (1999); see also 38 C.F.R. 4.87, DC 6260. Because the regulation does not define "tinnitus" any more specifically, the Department of Veterans Affairs (DVA) has consistently treated tinnitus as a central nervous system disease[1] with a single compensable disability, to wit, a phantom noise perceived in one ear (unilateral tinnitus), in both ears (bilateral tinnitus), or in the head. See, *e.g.*, *Cromley* v. *Brown*, 7 Vet. App. 376, 378 (1995); see also 68 Fed. Reg. 25,822 (2003) (codifying "current standard

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[1] Although the Secretary believes that tinnitus is a central nervous system disease, "[b]ecause over 200,000 veterans are currently rated for tinnitus under diagnostic code 6260 under Diseases of the Ear, for administrative efficiency, and because many are accustomed to looking in that section of the rating schedule, the current placement of tinnitus within the rating schedule will remain unchanged." 68 Fed. Reg. 25,822-25,823 (2003). That interpretation of tinnitus is medically sound. See Vet. Aff. Op. Gen. Couns. Prec. 2-03 at paras. 2-3 (May 22, 2003), available at 2003 WL 24100983 (collecting medical treatises and manuals describing tinnitus as a disorder of the brain, not the inner ear).

VA practice" that "tinnitus is a single disability arising in the brain * * * consist[ing] of the perception of sound in the absence of external stimulus * * * [regardless of] whether the tinnitus is perceived in one ear, both ears, or somewhere undefined in the head"); Pet. App. 13a (court of appeals decision tracing the consistency of DVA's interpretation).

2. Petitioner, served on active duty in the army from March 1966 to March 1969. Pet. App. 2a. Complaining of bilateral tinnitus, petitioner filed for disability compensation in early 1995. *Id.* at 18a. In October 1995 and again in April 1999, a DVA regional office applied the then-current version of DC 6260 and concluded that petitioner's tinnitus was service-connected but was not "persistent." *Id.* at 2a.

The Secretary amended DC 6260 in June 1999, and petitioner thereafter filed a substantive appeal asking the Board of Veterans' Appeals (Board) to re-evaluate his tinnitus under both versions of DC 6260. Pet. App. 19a. So doing, the Board held that (1) petitioner's pre-1999 tinnitus was not compensable because it was not "persistent," and (2) petitioner's post-1999 tinnitus was compensable, but only as a single disability, because it was "recurrent." *Id.* at 3a.

Petitioner appealed the Board's decision to the Court of Appeals for Veterans Claims (Veterans Court), arguing (Pet. App. 19a-20a) that his pre-1999 tinnitus was "persistent" and that, under both versions of DC 6260, bilateral tinnitus should be compensable as two disabilities. In June 2003, the Veterans Court ruled that the Board's application of the pre-1999 DC 6260 was arbitrary and capricious. *Id.* at 20a. Additionally, the Veterans Court vacated the Board's decision that bilateral tinnitus was compensable only as a single disability and

remanded for the Board to consider whether, in light of 38 C.F.R. 4.25(b),[2] bilateral tinnitus is a disease with two separate disabilities. *Ibid.*

The Secretary appealed to the Court of Appeals for the Federal Circuit, which vacated the Veterans Court's decision and remanded for the Veterans Court to consider its jurisdiction. *Smith* v. *Principi*, 108 Fed. Appx. 628 (2004).

3. On remand, the Veterans Court determined that it had jurisdiction over petitioner's appeal. Pet. App. 31a-34a, 37a-38a. Reaching the merits, the court again rejected the Board's application of the pre-1999 DC 6260 and remanded for the Board to produce an adequate statement of reasons. *Id.* at 34a-37a.

Turning to the question whether, under both versions of DC 6260, bilateral tinnitus is a disease with two separate disabilities, the Veterans Court held that DVA's determination that tinnitus was a disease with a single disability "conflict[ed] with the plain meaning of the regulation." Pet. App 39a. The court observed that DC 6260 lists tinnitus under the heading "disease of the ear." *Id.* at 41a. Because 38 C.F.R. 4.25(b) requires compensation for each disability "arising from a single disease entity," the court concluded that DVA must compensate petitioner "for each ear affected by a single case of tinnitus." Pet. App. 40a-41a. In dictum the court

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[2] Section 4.25(b) of Title 38, Code of Federal Regulations, provides in pertinent part:

> Except as otherwise provided in this schedule, the disabilities arising from a single disease entity, e.g., arthritis, multiple sclerosis, cerebrovascular accident, etc., are to be rated separately as are all other disabling conditions, if any.

noted that, "even if the regulations in this case were ambiguous, the Court would find the argument that [the Secretary's interpretation] embodied either a 'standard VA practice' or an established agency policy based on a 'common medical definition' to be unpersuasive." *Id.* at 45a; see *id.* at 41a ("Assuming, arguendo, that the regulation's language was not plain, the Court does not agree with the Secretary's contention that an examination of other DCs shows an intent of the drafters to exclude dual ratings unless the DC expressly provides for such dual rating.").

4. The Federal Circuit reversed. Pet. App. 1a-15a. First, the court held that DC 6260 and 38 C.F.R. 4.25(b) "leave[] 'in doubt' whether tinnitus in each ear constitutes separate disabilities." Pet. App. 11a. The court reasoned that "while tinnitus is listed under the heading '*diseases* of the ear,' DC 6260 does not address whether tinnitus, as perceived in one ear, two ears, or otherwise, is a single *disability*." *Id.* at 11a-12a (emphases added). The court found that the Veterans Court erroneously and without support assumed "that tinnitus in one ear constitutes one disability[] and that tinnitus in two ears constitutes two disabilities." *Id.* at 12a. The regulations, the court of appeals held, do not compel that assumption, which "DVA has reasonably rejected as not supported by the text of the regulations." *Ibid.* Because the regulations are silent as to whether bilateral tinnitus is a disease with one or two disabilities, the court observed that "deference must be afforded to the DVA's interpretation as long as that interpretation is not 'plainly erroneous or inconsistent with the regulations.'" *Ibid.* The court found "a lack of evidence in the record that the DVA's interpretation is plainly erroneous," and concluded that the DVA's interpretation is

"not inconsistent with the regulations." *Id.* at 13a. Finding also that DVA's treatment of bilateral tinnitus had been consistent over time and revealed in public documents,[3] the court of appeals concluded—contrary to the dictum in the Veterans Court's opinion—that DVA's interpretation deserved deference. *Id.* at 14a.

ARGUMENT

The two arguments that petitioner raises in his petition are waived because they were not presented to the court of appeals. In any event, petitioner's arguments are also wholly unsupported and contrary to sound precedent. For those reasons and because the court of appeals' correct decision does not conflict with any decision of this Court or any other court of appeals, this Court's review is unwarranted.

1.a. Petitioner contends (Pet. 5) that the court of appeals "fail[ed] to defer to the Veterans Court interpretation of VA regulations." Petitioner, however, never argued below that the court of appeals should defer to the Veterans Court's determination that the regulations required DVA to treat bilateral tinnitus as two disabilities; rather, petitioner argued only that the regulations clearly compel that conclusion. See Pet. C.A. Br. 2-5. By not raising the deference argument below, petitioner has waived it before this Court, and certiorari should be denied. See *Illinois* v. *Gates*, 459 U.S. 1028, 1029 (1982) (observing that "it is generally undesirable" to permit a party to seek reversal of a lower court judgment on a

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[3] "[M]ore importantly," stated the court, "even if the DVA's interpretation were not reflected in published documents and was only reflected in litigating documents, that would still not be a basis for declining to defer to the agency's interpretation of its own regulation." Pet. App. 14a.

ground not considered by that court); *Tennessee* v. *Dunlap*, 426 U.S. 312, 316 n.3 (1976) (new arguments or claims not raised below are not properly before the Court).

b. Even if petitioner's deference argument were not waived, petitioner would clearly be wrong in contending that the court of appeals had "to defer to the Veterans Court interpretation of VA regulations." Pet. 5.

This Court's decisions have made clear that federal courts are to defer to "*an agency's* interpretation of *its own* regulation." *Christensen* v. *Harris County*, 529 U.S. 576, 588 (2000) (emphases added) (discussing *Auer* v. *Robbins*, 519 U.S. 452 (1997)); see *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). Petitioner recognizes (Pet. 7) and builds his deference argument upon that principle, reasoning that deference is warranted because the Veterans Court has "final Executive Branch authority" to interpret DVA regulations, such that it is the de facto agency head (Pet. 12). In support of that position, petitioner argues (Pet. 8-10) that the Veterans Court is "expert" and "within the Executive Branch." Those arguments are meritless, however, because they rely on a misunderstanding of the jurisdiction and design of the Veterans Court.

The Secretary of Veterans Affairs is the authoritative interpreter of DVA regulations. Congress delegated to the Secretary—not to the Veterans Court—the authority to promulgate regulations to carry out the statute's requirements. 38 U.S.C. 501; see 38 U.S.C. 1155 (giving the Secretary authority to "adopt and apply" the regulations involved in this case). Bypassing the Veterans Court, Congress has made actions of the Secretary in promulgating regulations generally subject to judicial

review in the Federal Circuit. 38 U.S.C. 502. The Veterans Court, in fact, can pass upon regulations and DVA's interpretations of them only "when presented" in an appeal from the Board. 38 U.S.C. 7261(a). It would be peculiar, if the Veterans Court were the authoritative voice for interpreting DVA regulations, for Congress to have created only that one narrow channel by which a DVA regulation could be considered before the Veterans Court. Section 7252, moreover, prevents the Veterans Court from reviewing the schedule of ratings for disabilities, which is an integral part of the VA regulations involved in cases brought before the Veterans Court; if the Veterans Court were the true "head" of DVA, Congress would not have so limited its review functions.

Petitioner argues (Pet. 8-10) that the Veterans Court's interpretations of the Secretary's regulations are entitled to deference because the court is expert and located within the Executive Branch. Assuming *arguendo* that petitioner has properly characterized the Veterans Court as an executive agency, his argument runs aground on *Martin* v. *OSHRC*, 499 U.S. 144 (1991). The question in *Martin* was whether a reviewing court considering an ambiguous regulation should defer to the Secretary of Labor or to the Occupational Safety and Health Review Commission when Congress had split rulemaking and adjudication authority between them. *Id.* at 151. Looking to congressional intent as expressed in the statutory scheme, *id.* at 152, the Court held that the Secretary deserves deference because "the power to render authoritative interpretations" of the Secretary's regulations is "a necessary adjunct of the Secretary's powers to promulgate" those regulations. *Ibid.* (internal punctuation omitted); see *ibid.* ("Because the Secretary promulgates these stand- -ds, the Secretary is in a

better position than is the Commission to reconstruct the purpose of the regulations in question."). The Secretary of Veterans Affairs, like the Secretary of Labor in *Martin*, has exclusive rulemaking authority and has promulgated the regulations at issue in this case; the Veterans Court, like the Commission in *Martin*, is purely adjudicative. Presumptively, reviewing courts therefore should defer to the Secretary; and the Veterans Court's limited ability to consider the Secretary's regulations indicates that Congress did not choose to deviate from that presumption here. See *id.* at 157-158 (noting that Congress "is free" to pair adjudication with deference).

Insofar as the Veterans Court is viewed as an Article I legislative court *outside* the Executive Branch, there is no disagreement in the courts of appeals or in this Court that a federal court reviewing the judgment of an Article I court defers to an agency's interpretation of its own regulation, not to the Article I court's interpretation. See, *e.g.*, *American Express Co.* v. *United States*, 262 F.3d 1376, 1382 (Fed. Cir. 2001) (deferring to IRS when reviewing Court of Federal Claims); *Kurzet* v. *CIR*, 222 F.3d 830, 844-845 (10th Cir. 2000) (deferring to IRS when reviewing Tax Court). Further review is not warranted.

2. Petitioner's alternative contention[4] that ambiguities in DVA regulations must be resolved in favor of veterans is also wholly unsupported, contrary to precedent, and does not warrant further review. Petitioner relies upon the "Fishgold Rule," the canon of construction that statutory provisions benefitting members of the armed services are to be construed in the beneficia-

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[4] Petitioner did not raise his alternative argument in the court of appeals, and it is therefore waived.

ries' favor. Pet. 15 (citing *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220-221 n.9 (1991) and *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946)). That canon applies only to the intepretation of statutes, however, not to regulations, and the reasons for the canon's application are at their weakest when, as here, Congress has expressly given the Secretary flexible policymaking discretion to adopt and apply a schedule for veterans disability compensation.

Moreover, even if the canon were applicable in the regulatory context, it could not override the Secretary's reasonable construction of his own regulation. The rule of lenity, for example, "is not applicable unless there is a 'grievous ambiguity or uncertainty in the language and structure of the Act,' such that even after a court has seize[d] everything from which aid can be derived, it is still left with an ambiguous statute." *Chapman* v. *United States*, 500 U.S. 453, 463 (1991) (citations and internal punctuation omitted). By analogy, the canon cited by petitioner could have no application unless an ambiguity persisted even after consideration of "everything from which aid can be derived"—a category of interpretive aids that would assuredly include fundamental principles of administrative deference. The court of appeals was thus correct in concluding that the "pro-claimant nature of the veteran [benefits] adjudication system" does not prevent courts from deferring to the Secretary's policy decisions. *Gallegos* v. *Principi*, 283 F.3d 1309, 1314 (Fed. Cir.), cert. denied, 537 U.S. 1071 (2002).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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